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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

Estate of DENNIS I. WATSON, Deceased.

MARY S. WATSON,

Petitioner and Respondent,

v.

CYNTHIA D. WATSON,

Objector and Appellant.

F076979

(Super. Ct. No. 16CEPR00840)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Donald S. Black, Judge.

Coleman & Horowitz, Eliot S. Nahigian, Charles Fredrick Meine III and Brandon A. Hamparzoomian for Objector and Appellant.

Baker Manock & Jensen, John G. Michael and Jeffrey A. Jaech for Petitioner and Respondent.

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A contingent remainder beneficiary of a testamentary trust, the principal asset of which was an undivided one-half interest in real property used for farming, requested an accounting by the trustee. She then challenged the accounting and various items in it. She also requested removal of the trustee, alleging the trustee acted in bad faith in the

management of the trust estate. Further, she requested instructions requiring the trustee to lease the real property to herself as an individual, rather than operating the farm property for her own account. The trustee defended the accounting and opposed the request for her removal and the request for instructions. The trial court approved the accounting, denied the request to remove the trustee, denied the request for instructions, and denied both parties' requests for attorney fees incurred in the proceeding. We find no error in the trial court's order and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1976, Dennis I. Watson (decedent) married Mary S. Watson (Mary).¹ At that time, decedent had one daughter, Cynthia, from his previous marriage; Mary had two children, Martin and Kimberly (ages 15 and 13, respectively), from her previous marriage. Prior to their respective divorces and the marriage of decedent to Mary, decedent's family and Mary's family had been close and had socialized together. After the marriage of decedent and Mary, Martin and Kimberly lived with them; Cynthia lived with her mother. Decedent maintained a close relationship with his stepchildren, even after they moved out.

In 1983, decedent executed a will that stated he had "three children" and identified them as Cynthia, Martin, and Kimberly. The will left decedent's real and personal property to Mary, if she survived him, and to his children, in equal shares, if Mary did not survive him.

In July 1991, when decedent was terminally ill and hospitalized, Mary discussed with decedent the disposition of property on his death. Mary contacted an attorney, who suggested a trust might save the children estate taxes on Mary's death. The attorney and her paralegal came to the hospital and, out of Mary's presence, consulted decedent about

¹ We refer to the parties by their first names for clarity and convenience, because some of them share a last name or have multiple last names. No disrespect is intended.

how he wanted his property distributed. While they were there, decedent wrote a holographic will, dated July 3, 1991, which provided for a trust, with income to be paid to Mary during her life and, on her death, the remainder was to be distributed to his child, Cynthia, and his stepchildren, Martin and Kimberly, in equal shares.

On July 11, 1991, the attorney again visited decedent, and decedent executed a typed will. The typed will identified Cynthia as decedent's child, and Martin and Kimberly as his stepchildren. It left the residue of decedent's estate to a trust and named Mary as the trustee. It provided that all net income of the trust was to be paid to Mary during her lifetime. On Mary's death, the estate was to be distributed in equal shares to "children of mine." "Children of mine" was defined to include "my child and my stepchildren," as identified in the will. On the same date, decedent and Mary executed a quitclaim deed, converting their jointly held real property from joint tenancy to community property ownership.

Decedent died on July 13, 1991. After his death, Mary had the final will probated. She was appointed executor of decedent's will and performed her duties with the assistance of a paralegal. Mary obtained a judgment of final distribution and final distribution to testamentary trust (judgment) that distributed the assets of the probate estate to a testamentary trust. The primary asset of the trust was decedent's undivided one-half interest in the real property on which decedent and Mary had lived and which they had farmed during their marriage. The terms of the trust were set out in the judgment, essentially in the language used in the will. The trust terms provided that, on Mary's death, the remaining trust estate would be divided equally and be distributed to the "children of decedent."

In preparing the proposed judgment, however, the paralegal assisting Mary omitted the paragraph of the will defining "children" to include stepchildren. More than 20 years later, an attorney advised Mary that, because of the omission of the definition of "children" from the judgment, the judgment could be construed to require distribution on

Mary's death only to Cynthia. The attorney recommended Mary file a petition for correction of a clerical error in the judgment, and Mary did so.

The trial court granted Mary's petition and corrected the judgment to include the definition. On appeal, this court reversed and directed the trial court to deny the petition. Kimberly subsequently filed a petition for construction of the trust instrument, seeking a determination that the term "children," as used in the trust provisions, should be interpreted to include Cynthia, Martin, and Kimberly, as intended by decedent. Cynthia objected. The trial court granted that petition. In a companion case, Cynthia has appealed that order.

In 2014, while Mary's petition to correct the judgment was pending in the trial court, an attorney who represented Mary for only a short time advised that the trust instrument in the judgment permitted her to transfer the real property out of the trust and into her own name. Mary asked the attorney to obtain a second opinion about the propriety of doing so, and the attorney later told Mary she had done so. On the attorney's advice and recommendation, Mary executed a deed conveying the property from herself as trustee to herself as an individual. After Mary obtained new attorneys, they informed her the previous advice was incorrect and recommended she convey the real property back to the trust. She followed that advice.

The trust instrument provided Mary was not required to prepare accountings of the trust, unless a trust beneficiary made a written request for an accounting. In 2016, for the first time, Cynthia requested an accounting by Mary of the trust activities. Mary filed her first account and report of trustee, and Cynthia raised objections to it. In the document setting out her objections, Cynthia also requested that Mary be removed as trustee of the trust and be replaced with Cynthia, based on alleged breaches of Mary's duties as trustee. Cynthia further requested instructions requiring that Mary lease the real property from the trust in order to continue her farming operations there. The trial court overruled Cynthia's objections to the account and approved it. It denied her request for removal of

the trustee and her request to instruct Mary to lease the trust property. Cynthia appeals from that order.

DISCUSSION

I. Admission of Expert Testimony

Initially, we address Cynthia’s argument, first made in her reply brief, that this court should not consider the expert testimony Mary presented at trial. Cynthia contends “an expert witness cannot testify to legal conclusions in the guise of giving an expert opinion.” She essentially challenges the admissibility of the expert evidence.

Points raised for the first time in a reply brief on appeal will not be considered in the absence of a showing of good cause for failure to present them earlier. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764–765.) This is a matter of fairness to the opposing party, who does not have an adequate opportunity to respond. (*Ibid.*) Cynthia did not raise the issue of the admissibility of Mary’s evidence until her reply brief. She offered no reason for failing to raise the issue in her opening brief. Accordingly, we consider the issue forfeited.

II. Approval of Accounting

Cynthia raised some general objections to Mary’s account, as well as challenges to specific items within it.

A. Challenges to particular items

In addressing an accounting presented by the trustee of a trust estate, the probate court must “determine what items of expenditure incurred during administration are proper charges against the estate. [Citation.] The court in passing upon such expenditures is vested with a broad discretion which will not be disturbed on appeal except when abused.” (*Estate of Tierney* (1945) 68 Cal.App.2d 621, 626.) In the trial court, the party submitting a challenged accounting bears the burden of proving the propriety of the expenses for which compensation is sought. (*Conservatorship of*

Lefkowitz (1996) 50 Cal.App.4th 1310, 1316, fn. 4.) The trustee must present to the trial court satisfactory evidence of the accuracy and propriety of the items in the account, but the question before the appellate court is whether there is substantial evidence to support the trial court's findings. (*Estate of McLaughlin* (1954) 43 Cal.2d 462, 465–466.)

“ ‘When determining whether substantial evidence is present, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies. [Citation.] We merely determine if there is any substantial evidence, contradicted or not, which will support the conclusion of the trier of fact. [Citation.] Substantial evidence is “reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged” ’ ” (*Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1145.) Thus, we review the trial court's factual findings for substantial evidence and its allowance of particular items in the account for abuse of discretion.

When interpretation of a statute is required, or when interpretation of an instrument is required and no parol evidence has been admitted or the parol evidence is not conflicting, a question of law is presented, which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1802.)

On appeal, the judgment is presumed correct and the burden is on the appellant to affirmatively demonstrate prejudicial error. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.)

1. Funeral expenses

Cynthia asserts the trial court improperly approved payment to Mary of \$8,758.98 for decedent's funeral expenses. Mary testified she loaned that amount to the probate estate to pay the funeral expenses and expected to be repaid when the real property was sold or, if it was not sold during her lifetime, her estate would receive the repayment. She did this because decedent's estate had no money with which to pay the expenses; if

she had not made the loan, she would have had to sell some estate property in order to generate the cash to pay the expenses. Cynthia contends Mary, as an individual, was required to file a claim against the probate estate to obtain repayment of the loan for the funeral expenses, but she failed to file a timely claim, and her claim is therefore barred. Further, Cynthia asserts the judgment determined all debts of the probate estate had been paid, and Mary had no right to be paid from the trust estate.

A creditor of the probate estate must file a claim with the probate court within a limited time period or the claim will be barred. (Prob. Code, §§ 9000, 9002, 9100.)² A claim, in this context, means a demand for payment for a liability of the decedent, for a liability for taxes, or for a liability of the estate for funeral expenses of the decedent. (§ 9000, subd. (a).) An indebtedness incurred or liability that arose after the death of the decedent, with the exception of funeral expenses, does not require the filing of a claim. (*Sperry v. Tammany* (1951) 106 Cal.App.2d 694, 698.)

The trial court found the claim was not being asserted by a funeral home or similar provider for payment for its services. The obligation claimed by Mary was “not for payment of funeral expenses, per se, but for reimbursement by the estate of the monies she paid for [decedent’s] funeral and related expenses.” That obligation was incurred after decedent’s death. Therefore, the trial court concluded, no claim filing was required.

A charge for funeral expenses is a debt of the probate estate. (*Estate of Cornitius* (1957) 154 Cal.App.2d 422, 427–428.) “Notwithstanding any other statute, funeral expenses and expenses of last illness shall be charged against the estate of the decedent and shall not be allocated to, or charged against the community share of, the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses.” (§ 11446.) Mary testified she paid the funeral expenses in order to avoid selling the real

² All further statutory references are to the Probate Code, unless otherwise indicated.

property that was the principal asset of the probate estate. Leaving the burden of those expenses on Mary would violate the intent of section 11446.

“When all debts have been paid *or adequately provided for*, ... and the estate is in a condition to be closed, the personal representative shall file a petition for, and the court shall make, an order for final distribution of the estate.” (§ 11640, subd. (a), italics added.) Mary, as executor, was permitted to borrow on behalf of the probate estate. (§ 10514.) She provided for the funeral expenses by borrowing funds from herself, as an individual, to pay them. The loan was made without interest and was to be repaid when the property of the estate was sold. Although the loan was not documented with a promissory note, there was no dispute the funeral expenses were incurred, they were legitimate expenses of the probate estate, and they were paid by Mary loaning her own funds to the estate. Mary’s testimony that the probate estate had no cash with which to pay its expenses, and that borrowing was required to avoid selling estate property, was uncontroverted.

The trial court’s finding that Mary’s loan to the estate to cover decedent’s funeral expenses was an obligation incurred after decedent’s death, for which no claim filing was required, was supported by substantial evidence. The trial court did not abuse its discretion by approving this item as a liability of the trust estate.

2. Loan payoff

The trust estate included decedent’s undivided one-half interest in real property previously held by decedent and Mary as community property. During probate, Mary paid off the indebtedness on the property, in the amount of \$455,018.26. She made the payment with life insurance proceeds because the probate estate did not have any liquid assets with which to pay the debt. In the trust accounting, she claimed one-half that amount (\$227,509.13) as a loan from her to the trust. Cynthia contends this expense, like the payment of funeral expenses, was barred by Mary’s failure to make a claim for it in the probate proceeding.

The trust's obligation to repay Mary one-half of the amount she paid to remove the encumbrance from the real property did not arise until after decedent's death. Thus, it was not a liability of decedent for which a claim was required. (§ 9000; *Sperry v. Tammany*, *supra*, 106 Cal.App.2d at p. 698.) Because it was not a claim, Mary was not an unpaid creditor whose claim was barred by the judgment. (§§ 9000, subds. (a), (c), 11429.)

Prior to decedent's death, the real property was held as community property of the spouses. On decedent's death, his undivided one-half interest in the real property passed to and vested in the devisee under his last will, that is, the testamentary trust or its trustee. (§§ 34, 100, 7000; *Deming v. Drachmann* (1962) 202 Cal.App.2d 445, 448.) Accordingly, the property then belonged one-half to Mary individually, and one-half to the testamentary trust of which she was the trustee. Because the interest in the real property was created in or conveyed to multiple persons, without expressly declaring it to be a joint tenancy or partnership, and without the property being acquired as community property, it was held by Mary and the trust as tenants in common. (Civ. Code, §§ 685, 686; *Estate of Horn* (1951) 102 Cal.App.2d 635, 640.)

“ ‘The rule is that when one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as a matter of right to have his cotenant, who has received the benefit of it, refund to him his proportionate share of the amount paid.’ ” (*Conley v. Sharpe* (1943) 58 Cal.App.2d 145, 155–156.) “A tenant in common may redeem the common property from a mortgage and become entitled to an equitable lien on the interests of his cotenant for their just proportion of the redemption money.” (*A.F.C., Inc. v. Brockett* (1967) 257 Cal.App.2d 40, 43.)

Federal Farm Mtg. Corp. v. Sandberg (1950) 35 Cal.2d 1, on which Cynthia relies for the proposition that the trust received the real property free of Mary's claim for reimbursement, is inapposite. It involved a third party's allowed claim against the

probate estate, which was mistakenly not paid prior to distribution of the estate property. (*Id.* at pp. 2–3.) It did not involve a co-tenant’s payment to remove an encumbrance on commonly held real property.

Cynthia also asserts Mary’s claim for reimbursement was barred by laches. The trial court rejected this contention, stating there was “no evidence of reliance, change of position, or prejudice to Cynthia resulting from the fact that Mary paid off” the loan. (See, *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68 [“ ‘laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay’ ”].)

“Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained.” (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.) Cynthia has not attempted to show the trial court erred in its conclusion that her evidence failed to establish the elements of the defense of laches.³

Consequently, we find no error in the trial court’s allowance of this item in Mary’s accounting.

3. Mary’s attorney fees for petition to correct judgment

Mary’s accounting included her attorney fees incurred in unsuccessfully pursuing the petition to correct a clerical error in the judgment; the petition sought to include in the judgment language defining the term “children,” which appeared in the will, but was inadvertently omitted from the judgment. The language defined “children” to include both decedent’s child, Cynthia, and his stepchildren, Martin and Kimberly. Cynthia contends the attorney fees should not have been charged to the estate, because they did

³ We note Mary has not charged interest on the amount she paid. Consequently, the obligation of the trust has not increased over time.

not carry out the purpose of the trust, but served Mary's own interests or those of her children.

The trial court found there was no dispute the attorney fees were incurred, Mary acted on advice of counsel in bringing the petition, and her conduct was within the standard of care of a trustee. It also found that, in bringing the petition, Mary was acting in the capacity of trustee, to clarify the identities of the contingent remainder beneficiaries, so the trust could be administered in conformity with decedent's intention. The trust instrument authorized Mary to retain attorneys, and commence litigation as she deemed advisable, at the expense of the trust. The trial court concluded correcting an obvious error in the judgment was an action designed to carry out the purpose of the trust. We review for abuse of discretion the trial court's approval of the charge against the trust estate for attorney fees. (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461.)

“ ‘[A]mong the ordinary powers and duties of a trustee of a private trust are those of doing all acts necessary and expedient to collect, conserve and protect the property of the trust, to maintain and defend the integrity of the trust for the benefit of the beneficiaries and to employ such assistants as may be necessary for said purposes.’

[Citation.] ‘[W]here litigation is necessary for the preservation of the trust, it is both the right and duty of the trustee to employ counsel in the prosecution or defense thereof, and the trustee is entitled to reimbursement for his expenditures out of the trust fund.’

[Citation.] ‘If the trustee acts in good faith, he has the power to employ such assistants and to compensate such assistants out of the assets of the trust even though he may not ultimately succeed in establishing the position taken by him as such trustee.’ ”

(*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1226–1227.) The litigation must be for the benefit of the trust; the rule does not apply if the litigation is for the benefit of the trustee (e.g., defense of an action alleging breach of the trustee's fiduciary duties), or if the trustee inserts himself or herself into a dispute that is properly between the legatees or devisees. (*Id.* at pp. 1227–1228.)

The purpose of the trust, as indicated by the provisions of the will, was to provide for Mary's support during her lifetime and to pass the remainder of the trust estate to the three children on Mary's death. The petition to correct the judgment was not a dispute between the remainder beneficiaries. It was an attempt by the trustee to correct an obvious error in the judgment, which presented the potential for an ultimate distribution of the trust property that was not in accordance with decedent's intent. Substantial evidence supported the trial court's finding that Mary acted on advice of counsel in bringing the petition. In addition, she obtained a favorable ruling on the petition in the trial court. The reversal on appeal was based on a determination that the correction could not be made through the vehicle of a petition to correct a clerical error, because the error was not clerical. The expert testimony, together with the trial court's ruling in Mary's favor on the petition, indicated Mary acted reasonably in bringing the petition.

Cynthia argues Mary's petition benefitted her children, Martin and Kimberly, to the disadvantage of Cynthia. The will indicated it was decedent's intent that all three children, Cynthia, Martin, and Kimberly, were to share equally in the trust estate after Mary's death. If Mary had not acted to correct the judgment, she would have effectively favored Cynthia over Martin and Kimberly in her actions as trustee, in derogation of decedent's intent that all three children be treated equally. We conclude the trial court did not abuse its discretion in concluding Mary's petition for correction of the judgment was an action designed to carry out the purpose of the trust, and her attorney fees incurred in that litigation were a proper charge against the trust.

4. Shop area concrete

Mary's accounting included a loan from her to the trust of \$26,229 for the trust estate's one-half of the cost of concrete work installed on the farm property. The trial court found there was no dispute the concrete work was installed, and Mary paid for it. It approved the charge, finding: "The only Trust asset is the Ranch. The installation of new concrete in the shop area was a capital improvement to the Trust property."

Cynthia argues the burden was on Mary to prove the correctness of the charge against the estate, and she failed to carry her burden because the concrete was installed for Mary's benefit and she failed to keep separate records of the trust estate's expenses. On appeal, however, it is Cynthia's burden to show the trial court erred in approving the expense. "It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. [Citation.] This burden is a 'daunting' one. [Citation.] 'A party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient.' " (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409, italics omitted.) Cynthia has not met that standard. She argues facts without reference to the record. She fails to cite the evidence supporting the trial court's findings; she fails to demonstrate the evidence does not constitute substantial evidence supporting those findings.

There was evidence the shop area concrete was installed on the real property jointly owned by Mary and the trust. The concrete was an improvement to the real property, in which the estate holds an undivided one-half interest. The trial court properly approved the trustee's allocation of one-half the cost of the concrete to the trust estate.

5. Trustee's fees

The extent of the allowance of compensation to trustees for their work in the administration of the trust estate rests in the sound discretion of the trial court. In making that determination, the trial court has a right to consider the actions of the trustees in the management of the trust property and to fix their compensation accordingly. (*In re Estate of McLellan* (1936) 8 Cal.2d 49, 55.) While the trial court's allowance of trustee's fees " " "will not be disturbed on appeal in absence of a manifest showing of abuse" " " of discretion, "we review the factual findings on which the trial court based its exercise of

discretion under the substantial evidence standard.” (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 231.)

Cynthia contends the trial court misinterpreted the factors found in California Rules of Court, rule 7.776⁴ in approving the trustee’s fees. Cynthia has not demonstrated any misinterpretation of the law by the trial court. She merely sets out facts and allegations she believes bear on each factor, and effectively disagrees with the weight the trial court gave to the various factors in applying the rule. She has failed to establish any abuse of discretion in the trial court’s application of the relevant factors.

Cynthia also asserts Mary should have been denied trustee’s fees because she improperly administered the trust. Cynthia complains that Mary farmed for her own account, received all the income and paid all the expenses, failed to pay rent for the use of the property, transferred the property out of the trust and back, and did not keep separate records for the trust.

The trial court found the trust instrument entitled Mary, as trustee, to receive reasonable compensation for her services. Mary managed the farm herself for approximately 25 years after decedent’s death. “She made the property productive, insured it, incurred liabilities related to it, and its value increased” substantially. She also “assumed the burdens of maintaining the Trust estate and assumed liability for her actions taken in that capacity.” Preservation of the property required special farming skills, knowledge and experience; Mary managed the trust estate for the long-term, to

⁴ The rule provides: “In determining or approving compensation of a trustee, the court may consider, among other factors, the following: [¶] (1) The gross income of the trust estate; [¶] (2) The success or failure of the trustee’s administration; [¶] (3) Any unusual skill, expertise, or experience brought to the trustee’s work; [¶] (4) The fidelity or disloyalty shown by the trustee; [¶] (5) The amount of risk and responsibility assumed by the trustee; [¶] (6) The time spent in the performance of the trustee’s duties; [¶] (7) The custom in the community where the court is located regarding compensation authorized by settlors, compensation allowed by the court, or charges of corporate trustees for trusts of similar size and complexity; and [¶] (8) Whether the work performed was routine, or required more than ordinary skill or judgment.” (Cal. Rules of Court, rule 7.776.)

preserve its value for the remainder beneficiaries. Management of the property was a full-time job. The trial court rejected Cynthia's contentions that farming for Mary's own account, not paying rent for the use of the property, and not keeping separate records or trust accounts breached Mary's duties as trustee.⁵ Cynthia has not demonstrated that the trial court's findings were unsupported by substantial evidence. She has not established any abuse of discretion in the trial court's conclusion that, despite some formal irregularities in handling the trust estate, Mary competently managed the property, operated it profitably over a number of years, preserved it for the benefit of the remainder beneficiaries, and was therefore entitled to trustee's fees. This item was properly allowed.

B. Challenges to the accounting as a whole

1. Misrepresentations

Cynthia seems to contend the accounting as a whole should have been rejected because it contained misrepresentations. The only "misrepresentation" cited was the omission of the information that Mary transferred the real property out of the trust and back again. It does not appear this objection was raised or ruled on in the trial court.

Section 1061 governs the content of accounts that must be filed with the court. (§§ 1060, 1061.) In addition to other items, it requires a "summary showing" of "[t]he property on hand at the beginning of the period covered by the account." (§ 1061, subd. (a)(1).) On advice of her then counsel, Mary executed a deed transferring the trust estate's real property from Mary as trustee to Mary individually. This occurred in September 2014. On advice of different counsel, who disagreed with the advice given by prior counsel, Mary conveyed the property back to the trust in May 2015. Consequently,

⁵ We address the trial court's factual findings on those matters in part III(D)(2) and (4) below.

the accounting for 2015 was technically incorrect in including the value of the real property in the property on hand at the beginning of 2015.

An error in the accounting for one year would not justify denying approval of the entire accounting, which covered 24 calendar years, plus portions of two others. As to the accounting for 2015, Cynthia was aware of the property transfer before the court heard and ruled on Mary's request for approval of her first account; Cynthia included it in her objections to the accounting, as a basis for removing Mary as trustee. In her testimony at the hearing, Mary explained the transfers. She testified she did nothing differently in the handling of the property while it was technically not part of the trust. She continued to farm it the same way, and did not attempt to sell it or borrow against it. Denying approval of the accounting for 2015 and requiring that Mary submit a revised accounting disclosing the transfer would be an idle act; at the time the court approved the accounting, it already had before it all the information relating to the property transfer, and a revised accounting would add nothing of benefit to the court, the current income beneficiary, or the contingent remainder beneficiaries. Cynthia has not established any error in the trial court's approval of the accounting.

2. Not an accounting of trust activities

Cynthia contends the accounting was "not an accounting of receipts and disbursements and other activity of the Trust," but it was "a schedule of disbursements and expenditures that [Mary had] made from her own funds," because she did not keep separate records of the trust's activities. Cynthia asserts that, on this basis, approval of Mary's accounting was an abuse of discretion.

Cynthia's contention seems to be that, unless separate books and records were kept for the trust, there could be no accounting for its activities. But Mary and the trust each owned an undivided one-half interest in the farm property. Mary was able to provide information about the activities of the trust, even without books expressly devoted to trust activities. The activities of the trust were the activities of the farm, which

Mary operated and presumably kept records for. Other than as discussed in the section above regarding transfer of the real property out of the trust and back again, Cynthia does not assert that Mary's accounting was inaccurate as to the activities of the trust. She simply contends an accounting could not be made in the absence of separate books recording trust transactions. Cynthia has not asserted or cited evidence demonstrating that the items in the accounting would have been different if the books had been kept differently. To disapprove Mary's accounting solely because she did not keep separate books for the trust would prevent her from presenting any accounting at all for the trust's activities over the 25-year period. This would elevate form over substance. The trial court did not abuse its discretion by approving the accounting, even though it was based on records of the farm operations as a whole, rather than on separate records documenting the trust's activities alone.

3. Allocation of expenses

Cynthia contends the trial court abused its discretion in approving the allocation of expenses because the trust had no gross income and no cash to make disbursements, and made no disbursements from income for trustee fees, accounting costs, or litigation costs. She then asserts Mary's farming of the trust property for her own account was contrary to the intent of the trust. She has not cited anything in the record in support of her factual assertions;⁶ she has not explained what allocation of expenses she is addressing. Her argument is incomprehensible and insufficient to establish an abuse of the trial court's discretion.

⁶ "Each and every statement in a brief regarding matters that are in the record on appeal, whether factual or procedural, must be supported by a citation to the record. This rule applies regardless of where the reference occurs in the brief." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 97, fn. 2.)

III. Removal of Trustee

A. Standard of review

“The removal and substitution of a trustee is largely within the discretion of the trial court.” (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633.) Accordingly, the standard of review of the trial court’s order denying Cynthia’s request for removal of Mary as trustee is abuse of discretion. Discretion is abused when, “in the circumstances of the case, viewed most favorably in support of the decision, the decision exceeds ‘the bounds of reason.’ ” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.) In applying the abuse of discretion standard, “[t]he trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.” (*Ibid.*)

B. Standards for removal of trustee

The authority to remove a trustee is a power the court should not lightly exercise. (*Estate of Bixby* (1961) 55 Cal.2d 819, 826.) Whether a trustee should be removed depends upon the circumstances of the particular case. (*Jones v. Stubbs* (1955) 136 Cal.App.2d 490, 502 (*Jones*).) “[T]he court will not ordinarily remove a trustee appointed by the creator of the trust.” (*Bixby, supra*, at p. 826.)

A beneficiary of the trust may petition for removal of the trustee. (§ 15642, subd. (a).) The grounds for removal of a trustee by the court include the trustee’s commission of a breach of trust. (§§ 15642, subds. (a), (b)(1), 17200, subds. (a), (b)(10).) “A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust.” (§ 16400.) Such duties include a duty of loyalty, i.e., to administer the trust solely in the interest of the beneficiaries (§ 16002), a duty to deal with all beneficiaries impartially in administering the trust (§ 16003), a duty to avoid conflicts of interest and not engage in self-dealing (§ 16004), a duty to preserve trust property (§ 16006), and a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration (§ 16060). “The trustee shall administer the trust with reasonable care,

skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.” (§ 16040, subd. (a).)

“When the settlor of a trust has named a trustee, fully aware of possible conflicts inherent in his appointment, only rarely will the court remove that trustee, and it will never remove him for potential conflict of interest but only for demonstrated abuse of power detrimental to the trust. [Citations.] In *Estate of Brown*[(1937) 22 Cal.App.2d 480], the court said that the settlor’s named trustee will be removed only for extreme grounds, such as incapacity, dishonesty, or lack of the qualifications necessary to administer the trust.” (*Estate of Gilliland* (1977) 73 Cal.App.3d 515, 528.) In *Copley v. Copley* (1981) 126 Cal.App.3d 248, the court noted that, “ ‘probably the most common reason’ for a settlor to name a spouse who is also a primary beneficiary as [trustee] is to ensure the settlor’s ‘intentions for that beneficiary are carried out.’ ” (*Id.* at p. 287.) In *Copley*, in light of the testator’s naming of his wife as trustee, despite potential conflicts of interest, the court required “an extreme showing of trustee misconduct before removal” would be called for. (*Ibid.*)

C. Trial court’s ruling

The trial court found decedent named Mary as trustee of the trust despite circumstances presenting potential conflicts of interest. Mary is the sole beneficiary of the trust during her lifetime and owns the other undivided one-half interest in the farm property. The other beneficiaries have no interest in the trust until after Mary’s death. The trust instrument authorized Mary to invade the trust principal for her support, care, maintenance and education, although she never did so. It also authorized her to continue to hold and operate the farm interest; she was given discretion to sell, lease, or form a partnership with the farm interest. The exculpatory clause in the trust instrument

provided Mary would not be liable to any trust beneficiary for any act or default unless it resulted from her own bad faith or gross negligence.

Rather than selling or leasing the trust's interest in the real property to herself or forming a partnership with it to operate the farm, Mary operated the whole farm property for her own account. As permitted by the trust, she kept the income from farming the trust property. On the advice of her attorneys, she did not keep separate sets of books for the trust's interest and her own, and she did not prepare separate tax returns for the trust. When Mary transferred the real property out of the trust, she did so on advice of counsel; it was the attorney's idea. She later transferred the property back to the trust, on the advice of different counsel. While the property was out of the trust, Mary continued to farm it the same as she had before the transfer.

The trial court noted Mary managed the trust property "for over 25 years with no damage to the remaindermen." "Mary's conveyance of the Trust property to herself and back again on the advice of her attorneys did not rise to the level of gross negligence, bad faith, or excessive misconduct as would be required for removal under the Trust instrument and applicable authority." Her operation of the farm for her own account and her conduct in seeking to correct a clerical error in the judgment met the applicable standard of care.

Based on these findings, the trial court denied Cynthia's request for removal of Mary as trustee.

D. Substantial evidence supporting factual findings

Cynthia cites several actions Mary took as trustee that allegedly breached Mary's duties to the contingent beneficiaries. She contends Mary should have been removed as trustee because of these violations. The trial court found Mary acted within the standard of care of an individual trustee, such as Mary, or at least did not act in bad faith or with gross negligence that would warrant removal. Substantial evidence supports those findings.

1. Transferring property out of trust

The evidence presented the following facts. In September 2014, Mary, as trustee, signed a grant deed conveying all the real property from the trust to herself individually. An attorney who represented Mary for a short period advised that the trust instrument permitted her to transfer the property out of the trust and into her name. It was the attorney's idea to make the transfer. Mary asked the attorney to get a second opinion, to ensure the action was proper and consistent with the trust instrument. The attorney represented she had done so; she prepared the deed and Mary signed it. Mary signed the deed based on the recommendation of her attorney.

Mary subsequently obtained a new attorney, who researched the matter and advised her to transfer the property back to the trust. She did so by executing another grant deed in May 2015. During the time the property was deeded to her, Mary did not do anything differently in her handling of the property; she continued to farm it the same as she had previously.

Cynthia argues that, under the judgment, which acts as the trust instrument, Mary was entitled to all of the net income of the trust and was authorized to invade the trust principal if the net income was insufficient for her support. She contends Mary's transfer of the property into her own name was not done because the income of the trust was insufficient for her support; consequently, the transfer was contrary to decedent's intent and Mary's obligation to preserve the trust property for the remainder beneficiaries. Additionally, Cynthia asserts Mary was required by the trust instrument to consult the remainder beneficiaries and consider their desires before disposing of trust property, which Mary failed to do.

Substantial evidence supports the trial court's finding that Mary's conduct did not rise to the level of gross negligence, bad faith, or excessive misconduct needed to justify removal under the exculpatory clause of the trust instrument and under applicable law. The Probate Code "permits a fiduciary to delegate acts the fiduciary cannot 'reasonably

be required personally to perform’ [citation] and permits courts to excuse from liability fiduciaries who have acted reasonably and in good faith under the circumstances as known to the fiduciary.” (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 532.) Because a fiduciary must exercise the same degree of prudence and diligence as a reasonable person in a like capacity would use under similar circumstances, “a fiduciary not expert in [the applicable] law would arguably have a duty to retain competent ... counsel, and a corresponding right to exemption from liability for losses caused solely by counsel’s negligence.” (*Id.* at pp. 532–533.)

Mary and Kimberly testified Mary made the transfer out of the trust on the advice of her attorney, after the attorney purportedly consulted an expert for a second opinion that concurred with hers. Mary’s expert witness, an attorney whose practice focused on trusts and estates, opined that the transfer of the property from the trust and back again, on the advice of counsel, was within the applicable standard of care of a trustee who was not a licensed professional fiduciary. Substantial evidence supports the trial court’s findings that Mary acted on advice of legal counsel, and there was no evidence of any damage to the trust as a result of the property transfers. Substantial evidence also supports the trial court’s finding that the standards of extreme misconduct, bad faith, and gross negligence were not met.

Cynthia contends the timing of the transfers was suspect. The transfer out of the trust was made while Mary’s petition for correction of the judgment was pending. The transfer back to the trust was made after Mary’s petition was granted by the trial court. Cynthia suggests Mary purposely transferred the property out of the trust to preserve it for her own children when it appeared they might be excluded as remainder beneficiaries; when the petition to correct the judgment was granted, including Mary’s children as remainder beneficiaries, she transferred the property back to the trust.

Cynthia’s argument challenges the factual findings of the trial court. When the factual findings are challenged, our task is to determine whether, on the entire record,

there is any substantial evidence, contradicted or uncontradicted, that supports the judgment. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631.) We cannot weigh conflicts in the evidence. (*Id.* at p. 630.) We cannot substitute our own inferences from the evidence for those of the trial court. (*Id.* at p. 631.) We must resolve every conflict in the evidence in favor of the judgment. (*Ibid.*) The trial court’s findings were supported by substantial evidence.

Cynthia cites *Moore v. Bowes* (1937) 8 Cal.2d 162 (*Moore*) for the proposition that the trial court could not treat the property transfers as if they never happened. In *Moore*, the defendants were trustees under a voting trust agreement of a corporation. Without authorization, they withdrew \$600 from the corporation’s funds, in anticipation of an expected raise in their salary as directors of the corporation. (*Id.* at pp. 164–165.) When the raise was not approved, they returned the funds. (*Id.* at p. 165.) Based on the misappropriation, the trial court removed the defendants as voting trustees. (*Id.* at pp. 164, 165.) The court affirmed the removal. It stated: “Trustees are subject to removal whenever, as here, it appears that their private interests conflict with their trust duties, and when it also appears, as here, that trust property has been appropriated to their own use, whether or not they purported to act honestly under an assumption that they would become entitled to it and the money was returned when the contrary proved to be the fact. The purpose of removal is not the infliction of a penalty for past behavior, but is the preservation of the trust property.” (*Id.* at p. 165.)

Moore is distinguishable. The court in *Moore* did not address a testamentary trust in which the decedent who created the trust named his spouse as trustee and included in the trust instrument an exculpatory clause, which provided that the trustee would not be liable to any beneficiary for any act of the trustee in the absence of the trustee’s bad faith or gross negligence. Further, the rule as set out in *Moore* was that the trustees were “subject to removal” due to their misconduct, not that their removal was mandatory. Removal was still within the discretion of the trial court. The *Moore* court was reviewing

an order removing the trustees, where “[t]he facts found by the court fully support[ed] its conclusion.” (*Moore, supra*, 8 Cal.2d at p. 165.) Thus, the trial court exercised its discretion to remove the trustees, and the reviewing court found no error. The court did not determine whether the same facts would have supported an order denying removal. (See *Jones, supra*, 136 Cal.App.2d at pp. 500–502 [distinguishing *Moore* and finding no abuse of discretion in trial court’s denial of removal of the trustee, despite errors in her conduct as trustee].)

Cynthia asserts Mary breached her duties as trustee by failing to consult Cynthia, a remainder beneficiary, before transferring the property out of the trust. The trust instrument provided: “The Trustee, in making a decision as to the disposition or retention of trust property, shall consult with and give consideration to the desires of any beneficiary under decedent’s [w]ill in whom such trust property shall vest” Cynthia also contends Mary was bound to disclose the property transfer, because she was required to disclose to the beneficiaries information reasonably necessary to enable the beneficiaries to enforce their rights under the trust or to prevent or redress a breach of trust. (§ 16060; Cal. Law Revision Com. com., 54A pt. 1 West’s Ann. Prob. Code (2011 ed.) foll. § 16060, p. 72.) She asserts Mary failed to disclose the transfers in her accounting.

Although Mary did not consult with Cynthia before transferring the property out of the trust or inform her of the transfer at the time it was made, she reconveyed the property to the trust subsequently, without the need for Cynthia or any other beneficiary to express a desire that the property remain in the trust or to take steps to compel its return to the trust. No damage was done to the property or the contingent remainder beneficiaries’ interest because of the transfer. Mary testified the transfers were not included in the accounting because, by the time the accounting was prepared, the property had already been transferred back to the trust.

Although Mary's conduct may not have strictly complied with her obligations as trustee, substantial evidence before the trial court supported its determination that Mary's transfer of the real property out of the trust and back again was done on the advice of her attorneys and did not rise to the level of gross negligence, bad faith, or excessive misconduct.

The question before the trial court was not whether Mary committed any violation, technical or otherwise, of any duty she owed, as trustee, to the contingent remainder beneficiaries of the trust. The question was whether Mary should be removed as trustee of the trust. While a violation of a trustee's duties to the beneficiaries is grounds for the trustee's removal, it does not mandate removal. In determining whether to remove a trustee, the trial court exercises its discretion after reviewing the facts and circumstances surrounding the trustee's conduct. (See *Jones, supra*, 136 Cal.App.2d at p. 502.) In this case, the trial court properly considered evidence that Mary was not a professional fiduciary, that she acted on the advice of counsel, and that she did not act in bad faith. Cynthia has not established that the trial court abused its discretion in declining to remove Mary as trustee due to the transfer of the property out of and back into the trust.

2. Self-dealing (i.e., farming for Mary's own account)

The trust instrument provides: "The Trustee is expressly authorized to continue to hold and operate or participate in the operation of any farming or ranching property or interest that the Trustee receives or acquires under this trust as long as the Trustee deems advisable, at the risk of the trust estate." It authorizes the trustee to "manage, control, ... sell ... , convey, ... improve, and repair trust property," and "to lease assets to or from the trust for fair rental value." The trust instrument also authorizes the trustee to "continue to hold ... any property and to operate at the risk of the trust estate any business that the Trustee receives or acquires under the trust as long as the Trustee deems advisable."

Cynthia contends Mary owed the trust or the other beneficiaries an obligation to keep the trust's interests separate from her own, and she breached that obligation by farming the entire farm property, including the trust's one-half interest, for her own account. Cynthia asserts the trust instrument gave Mary options, including leasing the property from the trust at fair market value, operating the farm as a partnership between Mary and the trust, or farming at the risk of the trust. Mary ignored those options and operated the farm as if she owned it. Cynthia contends this violated Mary's obligations to the trust, regardless of fairness and good faith. Consequently, the trial court "abused its discretion when it allowed Mary to escape responsibility for her actions" and failed to remove Mary as trustee.

Initially, we note that, as Cynthia herself recognized, the purpose of removal is not to penalize the trustee for her actions, but to preserve the trust property. (*Moore, supra*, 8 Cal.2d at p. 165.) There was no evidence Mary's method of farming the trust property failed to preserve it. The trial court concluded that Mary's use of the property without leasing it to herself and paying herself rent "made no difference to the Trust," and was reasonable under the circumstances. As the sole income beneficiary of the trust during her lifetime, Mary was entitled to all the net income of the trust. Consequently, the net rent she paid would have gone to her. By operating the trust's one-half interest in the property for her own account, Mary assumed the risks of farming losses. Although Mary was authorized to invade the trust principal for her maintenance and support, she did not do so. The trust estate owed substantial amounts to Mary from trust principal. There was no evidence of any loss caused to the trust property by the manner in which Mary operated it. Mary's expert testified her operation of the property for her own account met the applicable standard of care, and the trial court agreed. Thus, substantial evidence supports the trial court's conclusion Mary's conduct in operating the entire farm property for her own account was within the applicable standard of care.

3. Bringing petition for correction of judgment

Cynthia contends that, by bringing the petition for correction of the judgment, Mary violated her duty of loyalty (§ 16002), her duty of impartiality (§ 16003), and her duty to avoid conflicts of interest (§ 16004). She asserts the error in the judgment did not harm Mary's interest in the trust, but harmed only Martin and Kimberly. Therefore, in bringing the petition, Mary favored her own children over Cynthia.

The trial court found Mary filed the petition because she felt an obligation to carry out decedent's intent. Decedent's will defined "children of mine" to include Cynthia and his stepchildren, Martin and Kimberly. Two prior wills also indicated decedent's intent that the three children share equally in the remainder of his property after Mary's death. Cynthia admitted the definition of "children of mine" appeared in decedent's will but denied understanding that it meant the term included decedent's stepchildren.

The trial court found that, "[d]espite understanding that doing so would oppose her father's intent and wishes, Cynthia opposed the motion" for correction. Mary incurred attorney fees and costs as a result. Mary's expert testified that bringing the petition was within the standard of care, and the trial court so found. Substantial evidence supports the trial court's conclusion that Mary's conduct met the applicable standard of care.

4. Failing to administer trust pursuant to terms of trust instrument

A "trustee has a duty to administer the trust according to the trust instrument." (§ 16000.) Cynthia contends Mary disregarded the trust instrument, failed to maintain a bank account and file income tax returns for the trust, commingled her property with the property of the trust, and failed to make the property productive for the estate. She fails to identify any provisions of the trust instrument she believes Mary violated.

The trial court found Mary acted on advice of counsel in administering the trust, including by not keeping separate books and filing separate tax returns for the trust. It stated Cynthia's assertion that Mary failed to follow the provisions of the trust instrument was "a form-over-substance argument for breach of trust, because Mary achieved a result

permissible under the Trust terms.” It found no evidence of bad faith or an extreme departure from the ordinary standard of care in Mary’s conduct as trustee. The trial court concluded Mary’s conduct was within the applicable standard of care and did not cause Cynthia any harm. Substantial evidence supports the trial court’s findings.

E. No abuse of discretion in denying removal

The question before this court is whether, in light of its factual findings, the trial court abused its discretion by denying Cynthia’s request for removal of Mary as trustee. In *Jones*, the decedent’s wife, Stubbs, was the trustee of his trust; his daughters from a previous marriage were the remainder beneficiaries and, along with the wife, were also the income beneficiaries. (*Jones, supra*, 136 Cal.App.2d at p. 492.) The major asset of the trust estate was shares in a corporation that had been owned by the decedent. (*Id.* at p. 491.) The daughters appealed from the trial court’s denial of their request to remove Stubbs as trustee. (*Ibid.*)

After decedent’s death, Stubbs was appointed manager of the corporation. (*Jones, supra*, 136 Cal.App.2d at p. 492.) She transferred \$21,000 of income from the corporation to the trust estate as income of the decedent accrued at the time of his death; she did so based on the advice of the attorney for the corporation and the estate, and on the written opinion of an inheritance tax attorney with the State Controller’s office. (*Ibid.*) The attorney from the State Controller’s office later changed his opinion, and the wife transferred the money back to the corporation. (*Ibid.*) The trial court found Stubbs acted in good faith and was entitled to rely on the advice of her attorney and other experts in taking that action. (*Id.* at p. 496.)

The trust did not file income tax returns for several years; the trustee explained that it had not yet been determined what was taxable profit, and her attorneys had conferred with state tax officials on the matter. (*Jones, supra*, 136 Cal.App.2d at pp. 493–494.) The trial court inferred the trustee was still negotiating with tax officials

regarding the taxes and concluded there was no evidence any interest or penalties had been or would be assessed due to the failure to file the returns. (*Id.* at p. 496.)

Stubbs dissolved the corporation without the consent of all the beneficiaries. (*Jones, supra*, 136 Cal.App.2d at p. 493.) The trial court found Stubbs believed in good faith she had the consent of all beneficiaries, and the dissolution saved \$50,000 to \$75,000 in corporate taxes. (*Id.* at p. 497.)

Stubbs kept no books of account for the trust; for information regarding the trust, she referred the beneficiaries to the accountant for the corporation, who permitted them to examine the corporate books. (*Jones, supra*, 136 Cal.App.2d at p. 494.) The trial court found Stubbs kept complete and accurate records of the trust and the corporation, and accounted for all the money received and disbursed. (*Id.* at pp. 497–498.)

The board of directors of the corporation authorized the sale of two lots held by the corporation to Stubbs. (*Jones, supra*, 136 Cal.App.2d at p. 493.) Stubbs, as a member of the board of directors, did not vote on that matter. (*Ibid.*) The sale was authorized by the board of directors, without Stubbs' participation; the sale was made shortly after decedent's death, at a price that was fair and adequate, and based on prices prepared by the decedent before his death. (*Id.* at p. 498.)

The reviewing court noted that the question whether Stubbs acted in good faith and for the benefit of the trust in dissolving the corporation was a question of fact for the trial court. (*Jones, supra*, 136 Cal.App.2d at p. 497.) Additionally, "the manner of keeping the books of the corporation and of the trustee could be improved upon," but the evidence did not compel a finding that the trustee should be removed; the determination whether there was a sufficient accounting by the trustee was for the trial court. (*Id.* at p. 498.) Further, it was "no doubt true" the sale of the corporation's property to Stubbs was improper, but it was for the trial court to determine whether the transaction was sufficient to require the trustee's removal. (*Ibid.*)

As to the daughters' contention that all of Stubbs' activities together presented sufficient grounds for her removal as trustee, the court stated: " 'A trustee is bound to act in the highest good faith toward his beneficiary [citation], and the question as to whether he does so act is one of fact for the trial court. A trustee may be removed when it appears that his private interests conflict with his trust duties. [Citation.] Whether a trustee should be removed, however, is a matter within the sound discretion of the trial court and is " 'dependent upon the circumstances of each particular case.' " ' " (*Jones, supra*, 136 Cal.App.2d at pp. 501–502.) The court also noted: " ' "It is a serious matter to dismiss trustees appointed by will; much more should be shown by those who wish them dismissed than would be the case where the trustees are appointed by the court." ' " (*Id.* at p. 501.)

The *Jones* court determined the trial court was justified in concluding that Stubbs had not acted in a manner detrimental to the trust or the beneficiaries. (*Jones, supra*, 136 Cal.App.2d at p. 502.) "It was for the trial court to weigh the testimony of the witnesses, and to determine as a court of equity whether the acts of respondent trustee were such as to require her removal as trustee. The court concluded that respondent had acted in good faith, that she was endeavoring to carry out the wishes of her deceased husband, the trustor, and that none of her acts was of a nature as to justify, much less require, the court to disregard the express desire of the trustor that she should be the trustee of trust." (*Ibid.*) Because the record supported the trial court's judgment, the judgment was affirmed. (*Ibid.*)

A trial court abuses its discretion when, under the particular circumstances of the case, its decision exceeds the bounds of reason or "transgresses the confines of the applicable principles of law" (i.e., misinterprets or misapplies the applicable law). (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294; see *Cahill v. San Diego Gas & Electric Co., supra*, 194 Cal.App.4th at p. 957.) " 'The burden is on the party complaining to establish an abuse of discretion' [Citations.] '[T]he showing is

insufficient if it presents facts which merely afford an opportunity for a difference of opinion.’ ” (*Brawley v. J.C. Interiors, Inc.* (2008) 161 Cal.App.4th 1126, 1138.)

Mary, like Stubbs, did not keep records of the trust activities separate from the records of the business that was the principal asset of the trust. Nonetheless, like Stubbs, she was able to account for the property of the trust through the records of the business. The trial court found her accounting sufficient. Also like Stubbs, Mary relied on the advice of counsel in administering the trust and managing the trust property. After decedent’s death, Mary continued farming the property she held jointly with the trust, paying the expenses of the farming enterprise and retaining the net income, as the trust instrument permitted her to do. She testified she tried to act in the best interests of all the beneficiaries and to carry out decedent’s intent. Additionally, Mary’s expert witness testified that Mary’s conduct in operating the farm property, administering the trust, and bringing the petition to correct the judgment was in accordance with the applicable standard of care of a trustee like Mary.

As in *Jones*, the trial court was justified in concluding the trustee did not act in a manner detrimental to the trust or its beneficiaries, and she did not receive anything from the trust to which she was not entitled. (*Jones, supra*, 136 Cal.App.2d at p. 502.) “It was for the trial court to weigh the testimony of the witnesses, and to determine as a court of equity whether the acts of [Mary] were such as to require her removal as trustee.” (*Ibid.*) The trial court concluded Mary acted reasonably and in good faith, she was endeavoring to carry out the wishes of decedent, and none of her acts was of a nature that would justify, much less require, removal of the trustee expressly appointed by decedent. Cynthia has not demonstrated an abuse of the trial court’s discretion.

IV. Cynthia’s Request for Instructions

Cynthia contends Mary was not permitted by the trust instrument to farm the trust property for her own account. Her objections to Mary’s accounting contained a request for instructions, seeking an order instructing Mary, as trustee, to lease the trust’s interest

in the real property to Mary individually, at a specified annual rent, “for a term of 20 years on commercially reasonable terms.” The trial court denied the request, observing Cynthia had cited no authority for requiring Mary to enter into a lease or other contract with the trust, and had not shown “how it would benefit the Trust beneficiaries to encumber the property with a lease for 20 years.” Such an order would interfere with Mary’s discretion to manage the property, which would be contrary to decedent’s intent.

“ ‘In view of the varied nature of the matters which may be freely brought before the probate court by the use of a petition for instructions, the action of the court with respect thereto should be upheld in the absence of an abuse of discretion.’ ” (*Estate of Denton* (1971) 17 Cal.App.3d 1070, 1075.) Cynthia does not challenge the sufficiency of the evidence to support the findings of fact on which the trial court’s decision was based. She concedes decedent intended Mary to farm the property, but insists Mary was required to do so at the risk of the trust, or by leasing the trust’s undivided one-half interest in the farm property at its fair rental value. “By farming the trust’s property for her own account without paying rent, Mary did not ascertain the nature and extent of her obligations and did not perform her duties as trustee.”

Cynthia admitted in her request for instructions that Mary “has paid all costs and expenses associated with farming the property except for one-half of the total cost of the shop cement.” Mary was entitled to all the net income of the trust property under the trust instrument. Requiring Mary to pay rent to the trust, deduct the trust’s portion of the farm expenses from its income, then pay the net income to Mary would not appear to benefit the trust, particularly when Mary currently bears the entire risk of farm losses. Further, binding the trust to a 20-year lease would reduce the trustee’s flexibility in managing the property and interfere with Mary’s exercise of the discretion conferred on her by the trust instrument. Cynthia has not demonstrated the trial court abused its discretion in denying her request for instructions to require Mary, as trustee, to lease the property to Mary individually.

V. Cynthia's Attorney Fees

Cynthia asserts she made two requests for attorney fees in her objections to Mary's accounting, and the trial court denied attorney fees without distinguishing between the two requests. She contends one request was premature and should have been denied without prejudice to presenting it later, and denial of the other request was an abuse of discretion. We disagree.

In her objections to Mary's accounting, Cynthia (1) objected that Mary failed to disclose as a liability of the trust Cynthia's claim for attorney fees for opposing Mary's petition to correct the judgment, (2) asserted it would be equitable for the trust to reimburse Cynthia for "her attorneys' fees incurred in vindicating her status as the sole remainder beneficiary",⁷ and (3) prayed for an award of attorney fees because Mary's opposition to Cynthia's objection to the accounting was without reasonable cause and in bad faith.

As to item (1), the objection was properly rejected, because, as Cynthia admits, the claim for attorney fees was not made within the period covered by Mary's accounting;⁸ therefore, it was properly omitted.

Regarding item (2), Cynthia contends her request for attorney fees was premature, Mary admitted it was premature, and the trial court therefore should not have ruled on it. Mary's response to Cynthia's objections, however, asserted item (1) was premature; Mary contested Cynthia's claim that her demand for reimbursement of attorney fees was a liability improperly omitted from Mary's accounting. Neither Mary's response to Cynthia's objections nor her closing brief addressed the merits of Cynthia's request for attorney fees for opposing the petition for correction. Thus, Mary did not take the

⁷ We interpret this language as referring to the attorney fees Cynthia incurred in opposing Mary's petition for correction of the judgment.

⁸ The accounting covered the period through April 30, 2016. Cynthia's demand for reimbursement of her attorney fees was made June 17, 2016.

position that Cynthia's request for attorney fees incurred in opposing the motion to correct the judgment was premature.

In the "Request for Instructions" portion of the document setting out Cynthia's objections to the accounting, Cynthia asserted she "incurred attorneys' fees to vindicate her position as the sole remainder beneficiary," she reserved her right to have her attorney fees paid from the trust, and it would be equitable for the trust estate to reimburse her for those attorney fees. The prayer, however, did not request an award of those fees.

The trial court's statement of decision discussed item (1), but not item (2). In its discussion of the petition for approval of the accounting, the trial court noted that Cynthia claimed her attorney fees were omitted from the liabilities reflected in the accounting. The trial court concluded attorney fees would be an omitted liability of the trust estate if they were presently due and owing, reasonable, and an expense for which there was a valid legal basis to charge the trust estate. It first found the claim for legal fees was made after the accounting period. It then rejected Cynthia's argument that a beneficiary, who successfully challenges the conduct of the trustee, may be awarded attorney fees from the trust, if the beneficiary's litigation resulted in a benefit to the trust or vindicated the intent of the trustor. (Citing *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 458.) The trial court stated: "Cynthia's status as a contingent remainder beneficiary was never in jeopardy or question. Moreover, Cynthia has not been successful. As a result, the central premises of the *Wells Fargo* decision—that attorneys' fees may be recovered where one (1) vindicates his status as a beneficiary and (2) thereby effectuates the will of the trustor, do not apply. [¶] The court finds that the Accounting properly discloses all liabilities."

In the portion of the statement of decision addressing Cynthia's request for instructions, the trial court addressed only Cynthia's request to require that the trust lease the real property to Mary as an individual, instead of permitting Mary to farm for her own

account. It did not discuss any claim of Cynthia, made in the request for instructions, for attorney fees for opposing the petition for correction of the judgment. Thus, neither Mary nor the trial court treated Cynthia's allegations regarding her attorney fees for opposing the petition for correction as a current request for an award of attorney fees.

In the disposition section of the statement of decision, after disposing of issues raised in Kimberly's petition for construction of the trust instrument, Mary's petition for approval of the accounting, and Cynthia's request for instructions, the trial court "denie[d] Cynthia's petition for her attorneys' fees to be paid from the Trust, and denie[d] Mary's request for attorneys' fees." Likewise, the order overruling Cynthia's objections and approving Mary's first account states: "4. Cynthia Watson's petition for her attorneys' fees to be paid from the trust is denied. [¶] 5. Mary Watson's petition for her attorneys' fees to be paid by Cynthia Watson is denied." We interpret these provisions as the trial court's ruling on the parties' competing requests for attorney fees incurred in litigating the matters then before the court, that is, matters relating to the accounting and removal of the trustee. There was no reference to any attorney fees arising out of the petition for correction of the judgment. Consequently, we conclude the trial court did not rule on the merits of any claim for attorney fees in item (2).

As to item (3), Cynthia contends the trial court abused its discretion by denying her an award of her attorney fees incurred in objecting to Mary's accounting. She asserts she did not request an award against the trust, but an award against Mary's interest or her compensation as trustee, pursuant to section 17211, subdivision (b).

"If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust." (§ 17211, subd. (b).) "[R]easonable cause to oppose a contest of an account requires an

objectively reasonable belief, based on the facts then known to the trustee, either that the claims are legally or factually unfounded or that the petitioner is not entitled to the requested remedies. Conversely, there would be no reasonable cause to oppose a contest of an account only if all reasonable attorneys would have agreed that the opposition was totally without merit, or, in other words, no reasonable attorney would have believed that the opposition had any merit. [W]e independently review the trial court’s finding on the existence of reasonable cause absent any factual dispute” concerning the trustee’s knowledge. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 927.) Bad faith, however, is a factual inquiry, which we review with the substantial evidence standard. (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1226.)

The trial court ruled against Cynthia on all of her objections to the accounting. We have found no error in its rulings. The trial court found no bad faith on Mary’s part. We conclude Mary had reasonable cause to oppose Cynthia’s challenge to Mary’s accounting. Consequently, the trial court did not abuse its discretion in denying Cynthia’s request for attorney fees.

DISPOSITION

The January 2, 2018 order overruling objections and approving first account and report of trustee, is affirmed. Mary is entitled to her costs on appeal.

HILL, P.J.

WE CONCUR:

LEVY, J.

DETJEN, J.